

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98 B 085

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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JOSEPH A. ARAGON,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,  
FREMONT CORRECTIONAL FACILITY,

Respondent.

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THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on July 2, 1998 and on August 20, 1998 at 1525 Sherman Street, B-65, Denver, Colorado. Respondent was represented by A. A. Lee Hegner, Attorney at Law and Assistant Attorney General Diane Michaud . Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

**MATTER APPEALED**

Complainant appeals a disciplinary demotion from a CSSO III, Grade 88 Step 7 - 3735 to a CSSO II, Grade 84 Step 7 - 3388. For the reasons set forth below, **Respondent is reversed.**

**PRELIMINARY MATTERS**

**1. Exhibits**

The parties stipulated to Respondent's Exhibits 1 through 3, 5 through 8, 10, 12 through 22 and Complainant's Exhibits A through C.

Respondent's Exhibits 4 and 11 were accepted into evidence without objection and

Respondent's Exhibit 9 was accepted into evidence over a hearsay objection by Complainant's Counsel.

Complainant's Exhibits D and G were accepted into evidence without objection. Complainant's Exhibit E was accepted into evidence over objection as hearsay. Although Exhibit E is hearsay it is also relevant and reliable in that it was an informal incident report made within 24 hours of the incident. Complainant's Exhibit F is the same document accepted as Respondent's Exhibit 12.

At the request of Respondent's counsel, Judicial notice was taken of the Colorado State Constitution and the laws of the State of Colorado including the Code of Colorado Regulations.

## **2. Witnesses**

All witnesses, other than Complainant and Respondent's advisory witness, Warden Gary D. Neet, were sequestered throughout the hearing,

Respondent called the following witnesses: Warden Gary D. Neet, Fremont Correctional Facility, Department of Corrections (DOC) and the appointing authority in this matter; Lt. Anthony Trainor, shift commander on October 29, 1997; Officer Debra Peters.

Complainant testified on his own behalf and called the following witnesses: Sgt. Elizabeth Usselton; Sgt. Harry Schumer; Officer James McHenry; Officer Richard Lilly;

## **ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether the actions of Complainant warranted the disciplinary action imposed;
3. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;
4. Whether Complainant is entitled to attorneys fees and costs.

## **FINDINGS OF FACT**

1. Prior to his demotion, Complainant held the rank of CSSO III (lieutenant) at the Fremont Correctional Facility, assigned to the “swing shift” from 2:00 p.m. to 10:00 p.m. Complainant has been employed by the Colorado Department of Corrections (DOC) for more that 18 (eighteen) years.

2. Fremont Correctional Facility (Fremont) employs approximately 400 (four hundred) staff and houses approximately 11,080 (Eleven Thousand and Eighty) inmates including maximum security inmates awaiting transfer. Fremont is one of the largest DOC facilities, located on a “sprawling” compound, and is part of the “Canon Complex”.

3. Throughout the evening of October 29, 1997 an “emergency situation” developed at the Fremont Correctional Facility. The emergency situation continued into the early morning hours of October 30, 1997. DOC emergency situations include: a major fire at the facility, an inmate strike, an inmate death or assault, and escape.

4. During the 9:00 p.m. inmate count on October 29, 1997, inmate Brian Hood (who was incarcerated for complicity to murder) was missing from his cell.

5. In an escape situation, a siren is activated in the Canon Complex to alert civilians in the surrounding communities and local law enforcement is notified regarding the escape. Such was done on the evening of October 29, 1997.

6. Under normal circumstances the “command structure” at Fremont is a “paramilitary structure” with the warden in command. In an emergency situation, such as an escape, the “shift commander” takes command. On the evening of October 29, 1997 Lt. Anthony Trainor was the shift commander and assumed command under emergency situation procedures. Lt. Trainor chose the “control center” as his command post.

7. Under normal circumstances Lt. Trainor would have ended his shift at 10:00 p.m. However, on the evening of October 29, 1997 Lt. Trainor remained in command, due to the emergency situation, until approximately 1:00 a.m. (October 30, 1997) at which time he relinquished command to Warden Neet who arrived at Fremont at that time. Prior to relinquishing command to Warden Neet, Lt. Trainor and Associate Warden Nard Claar briefed Warden Neet regarding the escape situation.

8. Under normal circumstances, inmate counts are completed by staff within each “living unit”, also known as cell houses. A staff member from each unit brings the count to the “control center” for tabulation. The shift commander, who is not usually assigned to the control center, then checks the tabulations.

9. The control center is approximately 30 (thirty) feet square with windows

approximately 3 (three) feet square on two and one-half (2 and ½) sides of the control center . The control center has its own lavatory on the fourth (4th) side where the staff enter and exit. In order for personnel inside the control center to speak directly to anyone outside the control center, the person inside must speak through a circular portal approximately five (5) inches in diameter. The person outside must bend down, due to the low placement of the portal in the window, and put his or her ear up to the portal.

10. Officers Debra Peters and Don Simoneaux were assigned to duty in the control center on the evening of October 29, 1997. Lt. Trainor and Officers Peters and Simoneaux were in the control center as the emergency/escape situation unfolded. At approximately 9:55 p.m. they were joined by Officer Rusick who came in to “run the doors” and Sgt. Uselton who remained in the control center until approximately 12:00 midnight.

11. Complainant was the supervisor on duty in Cell House 8 (eight) for the swing shift on October 29, 1997. Sgt. Harry Schumer and Officer Richard Lilly were subordinate to Complainant in Cell House 8 (eight) for the swing shift on October 29, 1997.

12. After the 9:00 p.m. count, at approximately 9:30 p.m. on October 29, 1997 Lt. Trainor was in the control center. Sgt. Schumer asked Lt. Trainor if he (Lt. Trainor) knew where Brian Hood was because the living unit had not been able to locate Hood. Lt. Trainor responded that he did not know where Hood was and then notified the cell houses (living units) to do a recount.

13. After the recount two inmates were confirmed missing. At that point the situation became an emergency situation as a possible escape. Lt. Trainor opened the “escape packet” which gave him step-by-step procedures to be followed in the event of an escape, e.g. procedures for search of the facility, notifications, etc. (See paragraph 5. above.)

14. A third “special count” was completed by Sgt. Schumer and Officer Lilly in Cell House 8.

15. Pursuant to emergency procedures, Lt. Trainor also advised all staff to remain on duty, i.e. past the normal end of the “swing shift” at 10:00 p.m. and further “no one is to leave the facility until authorized.” This announcement was made to all staff over the radio system, also known as “packsets”, and over the public address (p.a.) system by Officer Peters at approximately 9:45 p.m., shortly before 10:00 p.m. and shortly after 10:00 p.m.

16. It is the practice in some, if not all, cell houses/living units to turn down the public address system speakers in order not to disturb the inmates at night.

17. The packsets in use at Fremont get feedback on messages sent from the control center which makes it difficult to understand the sender.

18. Officer James McHenry, on duty at Fremont the evening of October 29, 1997, heard no announcement over the p.a. system or his packset regarding whether the swing shift staff could

go or should stay. (See Complainant's Exhibit E.) Officer McHenry wore his packset with shoulder microphone throughout the evening.

19. Sgt. Uselton, who was on duty in the control center, heard no announcements advising the staff to stay until released.

20. Officer Lilly did not hear any order to remain on duty (past the shift change on the evening of October 29, 1997) over the p.a. system, by radio/packset, by telephone or word-of-mouth. (Complainant's Exhibit D.)

21. It is general knowledge among the staff at Fremont that all staff should remain on duty during an emergency situation until properly authorized to leave, even if this means staying past the end time of a shift and even if no announcement (directing the staff to remain) is made. Complainant was aware that he should remain until authorized to leave.

22. At approximately 10:00 p.m. the graveyard shift arrived at Cell House 8. The graveyard shift on October 29, 1997 consisted of Capt. Dale Erps, Sgt. Wilson and Officer Coram. Due to the emergency situation, Complainant, Sgt. Schumer and Officer Lilly remained on duty past the usual end of their shift, awaiting instructions. (Complainant's Exhibit D.)

23. At approximately 10:30 p.m. Complainant and Sgt. Schumer went to the control center, checked in through the portal and then went to the parking lot to search for the missing inmates, as per escape procedures. (Complainant's Exhibit D.)

24. Complainant did not approach the portal again for the remainder of the evening.

25. At approximately the same time Officer Lilly was called to the control center, via phone call to Officer Coram from the control center, to retrieve inmate Hood's case file from Cell House 8 and take it to the control center. Officer Lilly did so, then returned to Cell House 8. (Complainant's Exhibit D.)

26. Approximately 15 minutes later, at approximately 11:00 p.m., Officer Lilly was directed, via phone call to Officer Coram from the control center, to inventory Hood's cell to determine what clothes Hood was wearing. (Complainant's Exhibit D.)

27. At no time did Complainant ask Officer Lilly to search Hood's cell. (Complainant's Exhibit D.)

28. At approximately the same time, 11:00 p.m. Sgt. Schumer and Complainant returned from the parking lot and asked if there was anything they could do. There was no assignment for Sgt. Schumer and Complainant, so they stood outside the control room, between two and three feet (2 - 3 ft.) from the portal, awaiting instructions.

29. At approximately 11:00 p.m. Lt. Trainor gave a direct order, through the portal in the

control center, to Complainant, directing him to go to the living unit and check inmate Hood's cell to determine what clothes Hood was wearing. Lt. Trainor states that he made eye-contact with Complainant, even though Complainant did not bend down or place his ear near the portal. Lt. Trainor states that Complainant appeared to have understood the order because he (Lt. Trainor) observed Complainant go back "through the trap" to unit eight (Cell House 8).

30. At hearing Officer Debra Peters remembered Lt. Trainor ordering Complainant to inventory Hood's cell and that Complainant appeared to understand the order. Officer Peters remembers that Complainant said "yes" and walked away. However, at the R833 meeting Associate Warden Claar reported that when he interviewed her, Officer Peters remembered someone being at the portal "but she doesn't recall whether it was (Complainant) or not." (*See Respondent's Exhibit 4, page 25, last paragraph.*)

31. Sgt. Schumer, who had been with Complainant since approximately 10:00 p.m. and remained with Complainant until they left the facility together, never saw Lt. Trainor speak to or with Complainant.

32. Complainant did not search Hood's cell.

33. At approximately 11:20 p.m. Officer Lilly reported to the control center, regarding his inventory of inmate Hood's cell, to report what clothes Hood was wearing. (Complainant's Exhibit D).

34. Lt. Trainor admits that there was a lot going on in the control center between 11:00 p.m. and 11:30 p.m. but he states that he was not confused about issuing a direct order to Complainant.

35. Lt. Trainor states that it is possible the two orders were given to search inmate Hood's cell. However, he reports no recollection of ordering Officer Lilly, by telephone to Cell House 8, to search Hood's cell.

36. At some point in the evening, after Lt. Trainor took emergency command, he and Capt. Erps had a conversation about "releasing the staff" who had been held over due to the emergency.

37. Although Capt. Erps out-ranks Lt. Trainor, Lt. Trainor was in command, due to the emergency situation, on the evening of October 29, 1998 until Warden Neet took command at approximately 1:00 a.m. Capt. Erps, Complainant, Sgt. Schumer and Officer Lilly were aware that Lt. Trainor had emergency command.

38. Complainant, Sgt. Schumer and Officer Lilly left Fremont at approximately 11:30 p.m.

39. At approximately 12:30 a.m., October 30, 1998, the holdover staff was released by

telephone calls to the living units. This was not announced over the radio/packsets. It was accomplished by telephone calls and “word of mouth”.

40. Officer McHenry never received instruction regarding when he could leave. He left sometime between 1:00 a.m. and 3:00 a.m.

41. At approximately 12:30 a.m., October 30, 1998, Lt. Trainor reached Complainant at home by telephone. Complainant stated to Lt. Trainor that Capt. Erps had given him (Complainant) permission to go home. There was no discussion regarding anything other than whether Complainant had obtained proper permission to leave.

42. Warden Neet was verbally advised regarding the “insubordination” allegation against complainant. He requested and was properly delegated appointing authority in this matter. (Respondent’s Exhibit 1.)

43. Warden Neet directed Associate Warden Claar to fully investigate and report back to Warden Neet. Associate Warden Claar was also present at the R833 meeting held in this matter. He prepared written notes, detailing the findings of his investigation, in preparation for the R833 meeting. (Respondent’s Exhibit 9.)

44. Warden Neet considered DOC Administrative Regulation 100-20 (Respondent’s Exhibit 8) and the verbal reports of Capt. Erps, Officer Simoneaux and Sgt. Schuh in deciding to hold an R833 meeting in this matter.

45. An R833 meeting was held in two parts in order to allow Complainant to obtain representation. The first session was held on December 18, 1997 at which Complainant appeared without representation. (Respondent’s Exhibit 4.) The second session was held on December 31, 1997. Complainant had a representative, Mr. James Peasley, with him at the second session.

46. In deciding to demote Complainant, Warden Neet considered the statements made at the R833 meeting, an incident report filed by Officer Debra Peters (Respondent’s Exhibit 10), the written statements of Capt. Erps (Respondent’s Exhibit 11 and 12), a written Memorandum from Lt. Trainor to Associate Warden Claar (Respondent’s Exhibit 13), the Fremont Correctional Facility staff sign-in log (Respondent’s Exhibit 14), Complainant’s latest performance evaluations (Respondent’s Exhibits 21 and 22; Complainant’s Exhibit A), prior corrective actions (Respondent’s Exhibits 16 and 18), a Letter of Counseling (Respondent’s Exhibit 19), a letter to Complainant regarding his parking in a restricted lot (Respondent’s Exhibit 15) and considered that Complainant had no prior disciplinary actions. (See also Respondent’s Exhibit 3.) Warden Neet considered terminating Complainant’s employment due to the seriousness of the offense. However, Warden Neet felt that Complainant was competent and his actions in this matter merely compromised Complainant’s ability to lead by damaging his credibility. Therefore, Warden Neet decided to fashion a disciplinary action which would curtail Complainant’s leadership duties.

47. Capt. Erps indicated in his first written statement that he did not discuss “staying or

leaving” with Complainant. He did, however, jokingly advise Sgt. Schumer that “...everyone else on shift can go, but you may stay because it was your unit that lost the inmate.” (Respondent’s Exhibit 11.) In his second written statement, dated December 8, 1998, Capt. Erps remembered that the joking statement was made to Sgt. Schumer earlier in the evening in Cell House 7 (seven). Later, after the staff had checked the parking lot and “were around the outside of the control center wanting to know if they could go home. *I told the staff that they could go...*” Sgt. Schumer stated ‘We’re clear to go’. I said *yes.*” (Emphasis added, Respondent’s Exhibit 12.)

48. Capt. Erps cleared only the swing shift to go.

49. At approximately 11:30 p.m. on October 29, 1997 Sgt. Schumer, having received authorization from Capt. Erps, advised Complainant and Officer Lilly that they were cleared to go.

50. At approximately 11:30 p.m. Officer Uselton, who was on duty in the control center, overhear Capt. Erps ask, through the portal, if he could “let these guys go”. She remembers that Complainant and Sgt. Schumer were standing outside the control center but she did not see where they went afterward.

51. Lt. Trainor denies that any conversation between he and Capt. Erps, through the portal, regarding the release of staff occurred before 12:00 midnight. However, at the R833 meeting Lt. Trainor stated that he didn’t remember when the conversation with Capt Erps, about releasing the (swing shift) staff, occurred.

52. Although Complainant did not hear Lt. Trainor say the swing shift could go, because he saw Capt. Erps speaking to Lt. Trainor at the portal in the window of the control room immediately before Capt. Erps announced to Sgt. Schumer that the (swing shift) staff could go, Complainant believed he, Sgt. Schumer and Officer Lilly had the proper authorization to leave.

53. To insist on getting verbal authorization to leave the facility directly from Lt. Trainor, would have interfered with emergency procedures in progress.

54. Warden Neet did not believe Complainant’s version of the incidents at issue in this matter.

55. Warden Neet did not interview or consider observations or comments from subordinate staff in making his determinations to hold and R833 meeting or to demote Complainant.

56. Warden Neet reviewed Officer McHenry’s written statement (Complainant’s Exhibit E) regarding matters involved in these incidents but discounted the statement because it “didn’t say much”. Warden Neet noted, however, that Officer McHenry did not leave until released from duty.

57. Warden Neet did not consider the written chronology of events prepared by Sgt. Schumer on December 17, 1997 (Complainant’s Exhibit G).

58. Although all three members of the Cell House 8 “team” left at the same time, neither Sgt. Schumer nor Officer Lilly were disciplined because they were subordinate to Complainant, i.e



Complainant was the officer in charge for the swing shift at Cell House 8 on October 29, 1997.

59. Complainant suggested that perhaps he was singled out for disciplinary action because he was Hispanic.

60. The demotion of Complainant resulted in a loss his former leadership/supervisory position and approximately \$400.00 (Four hundred dollars) per month pay reduction.

61. Complainant is 56 (fifty-six) years old.

62. Complainant testified that he had no real reason to think the disciplinary action was imposed because of his age.

## **DISCUSSION**

The burden is upon Respondent to prove by a preponderance of the evidence that the acts, on which the discipline was based, occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

### **1. Insubordination**

Respondent argues that it met its burden both with regard to 1.) whether or not the act or omission occurred and 2.) whether just cause warrants the discipline imposed. There is no disagreement as to whether or not Complainant searched inmate Hood's cell; he did not. Complainant left the Fremont facility at approximately 11:30 p.m. on October 29, 1997. The question is whether these acts or omissions constitute insubordination.

#### **a. Failure to follow a direct order**

Complainant has no recollection of being asked, directed or ordered by Lt. Trainor to search inmate Hood's cell to determine what clothing Hood might be wearing. Sgt. Schumer was with Complainant from the time Complainant left Cell House 8, when the graveyard shift came in at approximately 10:00 p.m., until they left the facility with Officer Lilly at approximately 11:30 p.m. During that time Sgt Schumer never saw Complainant talk with Lt. Trainor. After they searched the parking lot, they stood away from the portal. Sgt. Schumer did not see Complainant approach the portal nor did Sgt. Schumer hear Lt. Trainor order Complainant to search Hood's cell.

Respondent argues that Lt. Trainor made eye-contact with Complainant and Complainant appeared to understand. As an offer of proof, Lt. Trainor says he saw Complainant walk toward Cell House 8. Lt. Trainor admits that there was a lot of activity in the control center that evening,

however, he states that he was not confused about his direct order to Complainant. Therefore Respondent argues, the appointing authority would have to believe Lt. Trainor was lying in order to find no grounds for disciplining Complainant.

It is the opinion of the undersigned administrative law judge (ALJ), however, that there are other reasonable explanations: It is quite possible that the order to search Hood's cell was given twice, once to Officer Lilly through Officer Coram via telephone and also given through the portal either in the direction of Complainant or directly to someone believed to be Complainant. Lt. Trainor had a lot of things to do that evening. He has no specific recollection of calling Cell House 8 or ordering Officer Lilly to search Hood's cell. Yet clearly the order was given. (*See Complainant's Exhibit C.*) It may also be that Lt. Trainor is confused, not about whether he gave a direct order to someone standing at or near the portal but, about *to whom* that order was given, *if* anyone heard it and more specifically *whether Complainant heard* and understood that Lt. Trainor was ordering him (Complainant) to search Hood's cell. Lt. Trainor may have issued the order but it cannot be insubordination if Complainant never heard the order.

The testimony is clear that it is difficult for anyone to hear or communicate through the portal in the control center. Communications in general were difficult that night. (*See paragraphs 16 through 20, above.*) Complainant may have appeared to understand Lt. Trainor's order to search Hood's cell but Complainant never received the order. He simply didn't hear the order, if it was given to him. Then when given permission to leave the facility through Sgt. Schumer, he walked toward Cell house 8 which Lt. Trainor thought indicated Complainant's understanding of the order.

Another possibility is that the order was given to someone other than Complainant. Due to the number of tasks necessary in an escape situation, perhaps Lt. Trainor simply thought it was Complainant to whom he was speaking through the portal.

**b. Failure to obtain proper permission to leave**

Respondent argues that Complainant knew or should have known that, in an emergency situation such as occurred on the evening of October 19, 1997, he needed to remain on duty until released by the commander. Throughout the evening, until approximately 1:00 a.m., Lt. Trainor was the commander due to the emergency/escape situation. Further, Respondent argues and Lt. Trainor states, he never gave permission for the swing shift to go home, that no one was released to go home until approximately 12:30 a.m., October 30, 1997.

Complainant agrees that he knew to stay after the end of his shift until properly authorized to leave. Complainant, Sgt. Schumer and Officer Lilly each knew that Lt. Trainor was in command, due to the emergency situation, on the evening of October 29, 1997. However, based on seeing the rapid-succession conversations, Complainant believed that Lt. Trainor had authorized the swing shift to leave, communicated through the portal to Capt. Erps, who communicated it to Sgt. Schumer, who told Complainant. Capt. Erps in his second written report on the incident clearly states "I told the staff that they could go...Sgt. Schumer stated 'we're clear to go' I said yes." (Respondent's Exhibit 12, Complainant's Exhibit F.) Sgt. Schumer testified that's the way it

happened and, like Complainant, Sgt. Schumer believed the authorization came from Lt. Trainor through Capt. Erps.

For each member of the swing shift to insist on speaking directly to Lt. Trainor would have interfered with necessary emergency procedures being implemented. Complainant, Sgt. Schumer and Officer Lilly stayed past the end of their shift participated in a search of the parking lot or other necessary procedure(s); then they stood with nothing to do for a few minutes until Capt. Erps gave them permission to leave, which they did.

## **2. Arbitrary and capricious**

Arbitrary and capricious can arise in one (or more) of three ways: a) by neglecting or refusing to procure evidence; b) by failing to give candid consideration to the evidence; and c) by exercising discretion based on evidence in such a way that reasonable people must reach a contrary conclusion. *Van de Vegt v. Board of Commissioners*, 55 P.2d 703, 705 (Colo.1936).

In this case the appointing authority, Warden Neet, neglected to procure evidence by failing to interview or consider statements by subordinate staff, e.g. Sgt. Schumer, Officer Lilly, Officer McHenry. (See paragraph 56 above.) Warden Neet failed to give candid consideration to the evidence, specifically Capt. Erps written reports which indicate there may have been a miscommunication in the authorization to go home on the evening of October 29, 1997. After considering Capt. Erps second written statement and the statements of Sgt. Schumer and Officer Lilly a reasonable person is compelled to reach the conclusion that Complainant never received the order to search Hood's cell and Capt. Erps, through Sgt. Schumer, gave Complainant authorization to leave which he Complainant came from Lt. Trainor.

## **3. Discrimination based on age or ethnicity**

In a case involving allegations of discrimination the Complainant bears the burden of establishing a prima facie case of discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973); *St. Mary's Honor Center v. Hicks*, 509 U. S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). A prima facie case of employment discrimination can be established by evidence that would tend to prove the following, *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397 (1997):

- A. Complainant belongs to a protected class;
- B. Complainant was qualified for and performing satisfactorily at the job in issue;
- C. Complainant suffered an adverse employment decision; and
- D. The circumstances give rise to an inference of discrimination.

If the Complainant presents a prima facie case, a presumption of discrimination arises and the burden shifts to the employer to present evidence that there was a legitimate non-discriminatory purpose for the adverse employment decision. *St. Mary's Honor Center v. Hicks, supra*.

In this case, Complainant himself confessed that he had no real reason to think the disciplinary action was imposed because of his age. The only offer of proof regarding discrimination based on ethnicity was that Complainant was singled out for discipline from the other members of the swing shift who were white. No testimony was given regarding Complainant as a member of a protected class; although he is clearly Hispanic.

There was insufficient evidence presented at hearing in this matter to create a prima facie case of discrimination. Nonetheless, Respondent provided a legitimate non-discriminatory reason for the disciplinary action against Complainant, i.e. he was the supervisor of the swing shift group which included Sgt. Schumer and Officer Lilly.

#### **4. Attorneys fees**

Colorado Revised Statutes Section 24-50-125.5 allow the awarding of attorneys fees only upon a finding "that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." In this case Warden Neet relied upon the statements of Lt. Trainor and upon the investigation of Associate Warden Claar, i.e. there was some basis to Warden Neet's inquiry and action. Respondent presented the basis for Warden Neet's action as evidence at hearing. No evidence was presented indicating bad faith, maliciousness or intent to harass on the part of Warden Neet.

### **CONCLUSIONS OF LAW**

1. Complainant had no knowledge of the order to search inmate Hood's cell. Complainant had proper authority, from Capt. Erps, to leave the Fremont facility. Complainant was not insubordinate on the evening of October 29, 1997.
2. Disciplinary action against Complainant was not warranted.
3. Respondent's actions in imposing discipline in this matter were arbitrary and capricious.
4. Respondent's actions were not instituted frivolously, in bad faith, maliciously, or as

a means of harassment nor were they otherwise groundless. Therefore Complainant is not entitled to costs including attorney's fees.

### **ORDER**

1. Respondent's actions are reversed.
2. Complainant is reinstated to his former rank with full back pay and benefits from the time of his demotion offset by any amounts earned since his demotion.

Dated this 2nd  
day of October 1998  
at Denver, CO

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Michael Gallegos  
Administrative Law Judge

### **NOTICE OF APPEAL RIGHTS**

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

**CERTIFICATE OF MAILING**

This is to certify that on this \_\_\_\_\_ day of October, 1998, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Mr. James R. Gilsdorf  
Attorney at Law  
1390 Logan St., Suite 402  
Denver, CO 80203

Mr. A. A. Lee Hegner  
Attorney at Law  
650 S. Cherry St., #820  
Denver, CO 80222-1825

and in the interoffice mail to:

Ms. Diane Michaud  
First Assistant Attorney General  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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